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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-759

WAYNE L. KIDWELL, et al,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

AMICUS CURIAE BRIEF OF THE STATE OF UTAH

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INTEREST OF THE STATE OF UTAH

The State of Utah is interested in the disposition of this case because Utah has a state take-over offer disclosure act similar to the Idaho statute which is under attack. Utah Code Ann. §§ 61-4-1 to 13 (Supp. 1977). Futhermore, the case presents questions which, if resolved favorably to appellee (Great Western), threaten to substantially impact upon and diminish the ability of the State of Utah to administer not only its take-over offer disclosure act, but all its laws.

This amicus will restate only such facts of the case as are necessary in the text of its argument.

SUMMARY OF ARGUMENT

1. The District Court did not have diversity jurisdiction since a state is not a citizen for purposes of such jurisdiction. The Idaho state officials acted only as the arm or alter ego of the state, and were not citizens of the state for purposes of diversity jurisdiction.

2. The District Court did not have jurisdiction under 28 U.S.C. § 1337 since the Securities Exchange Act of 1934 is not an act regulating commerce.

3. The District Court did not have jurisdiction under the Securities Exchange Act of 1934 since the Idaho officials did not violate that Act by merely enforcing the Idaho take-over statute.

4. Even if the Idaho officials are treated as private defendants, they have not been accorded the due process protection, as non-residents, which the Constitution requires. The fact that some of the impacts of the officials' actions in Idaho were felt in Texas is not sufficient to support a finding that the officials purposefully availed themselves of the privilege of conducting activities within Texas. Further, there were no acts or occurrences which constitute sufficient minimum contacts with Texas to support long-arm jurisdiction under the current holdings of this Court. The decisions of the lower courts in this case have created a new basis for jurisdiction over non-resident state officials which would

subject countless state statutes and officials to attacks in distant federal courts. This expanded basis for jurisdiction does not meet the due process standards of the Constitution.

5. The Securities Exchange Act of 1934 does not support venue in the Northern District of Texas since none of the Idaho officials is found in or is an inhabitant of that district, none of the officials transacted business in that district, and the alleged violation did not occur there.

6. 28 U.S.C. § 1391(b) does not support venue in the Northern District of Texas since the claim in this action arose in Idaho, not Texas. A weighing of contacts analysis shows clearly that the claim arose in Idaho.

7. Under the doctrines of abstention, comity and federalism, the federal courts should have declined to hear this case, and should now stay the proceedings pending a state adjudication of the issues. The Idaho statute in question is a new enactment which has not yet been construed by the courts of Idaho. State court construction of the statute might well obviate or modify the federal constitutional issues.

8. The Idaho statute is not pre-empted by the federal Williams Act. Congress has evidenced a positive intent to allow dual regulation of corporate take-over offers by both state and federal authorities. Further, the Idaho statute and the other 31 similar state statutes do not create an obstacle to the accomplishment of the

purposes of the Williams Act. Stake take-over statutes supplement the Williams Act, and do not conflict with it.

ARGUMENT

I. *THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1332 OR 28 U.S.C. § 1337.*

A. JURISDICTION DOES NOT EXIST UNDER 28 U.S.C. § 1332 (DIVERSITY CASES).

Subject matter jurisdiction is not proper under 28 U.S.C. § 1332 since a state is not a citizen for purposes of diversity jurisdiction. *Postal Telegraph Cable Company v. Alabama*, 155 U.S. 482 (1894); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Generally, a suit against a state agency and/or its officers is considered to be against the state itself unless the agency is "endowed with such a separate and distinct existence as that its activities are not those of the state [sic]." *Craig v. Southern Natural Gas Company*, 125 F.2d 66, 67 (5th Cir. 1942). In *State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929) for example, the Court noted that since the state was acting through its officers, its officers were but the arm or alter ego of the state. The officers

were therefore not "citizens of the state" for purposes of diversity jurisdiction.

Factors used to determine whether or not a state agency has a "separate and distinct existence" include the capacity of the agency to sue and to be sued, the financial connection between the agency and the state, the performance of an essential government function by the agency and the corporate status or lack thereof of the agency. 6 A.L.R. Fed. 615. Two factors have been identified as being of primary importance, namely, performance of a governmental function and the financial connection between the agency and the state. *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 141 (D. Idaho 1975).

The Idaho Department of Finance is endowed with the broad powers to regulate the sale and purchase of securities. There is little doubt that regulation of securities is considered to be a governmental function. Under the tests laid down in *Idaho Potato, supra*, it appears that the Director of the Department of Finance is a mere arm or alter ego of the state and as such cannot be considered to be an individual citizen under 28 U.S.C. § 1332.

It is clear that the named individual defendants in this action are being sued in their official capacities and that no claims have been personally made against them. Defendant McEldowney is acting solely for and on behalf of the Idaho Department of Finance and defendant Kidwell is acting for Idaho solely as its Attorney

General. It is clear that the defendants are simply alter egos for the State of Idaho and are not individual citizens for purposes of diversity jurisdiction.

B. JURISDICTION DOES NOT EXIST UNDER 28 U.S.C. § 1337 (CASES BASED ON ACTS REGULATING COMMERCE).

28 U.S.C. § 1337 provides that:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any *Act of Congress* regulating commerce or protecting trade and commerce against restraint and monopolies. (Emphasis added.)

As discussed in Part II, below, subject matter jurisdiction cannot be predicated upon this statute since plaintiff does not have a cause of action under the Securities Exchange Act of 1934, and therefore has not alleged an action arising under an "Act of Congress regulating commerce." *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971) ("Jurisdiction under § 1337 does not attach on the bare assertion that a right under an act regulating commerce is infringed. Facts must be alleged to show that federal law in the particular case creates a duty or remedy.")

Further, to the extent that this action is based upon the alleged unconstitutionality of the Idaho statute, the action does not arise under an "Act of Congress."

II. *THE DISTRICT COURT DID NOT HAVE IN PERSONAM JURISDICTION UNDER THE SECURITIES EXCHANGE ACT OF 1934 OR PURSUANT TO EX PARTE YOUNG.*

A. JURISDICTION DOES NOT EXIST UNDER THE SECURITIES EXCHANGE ACT.

In order to invoke the jurisdictional provisions of Section 27 of the Securities Exchange Act (15 U.S.C. § 78a et. seq. (1970)) so as to effect extra-territorial service of process, a plaintiff must establish a prima facie cause of action under the Act. *Bell v. Hood*, 327 U.S. 678 (1945). Great Western and the Circuit Court have attempted to bootstrap this case into the sphere of the Act, thereby invoking its jurisdictional provisions, by alleging that the Idaho tender-offer statute is preempted by and conflicts with the Act, resulting in a "violation" of the Act. The Circuit Court has misconstrued the purposes of both Sections 27 and 28 in a convoluted attempt to base jurisdiction upon the statute.

The purpose of Section 27 is to afford a remedy for violations of the substantive provisions of the Act. In the tender-offer context these provisions have to do with disclosures, material misstatements or omissions, and fraudulent or manipulative acts. See, e.g. *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). No such violation is alleged here.

Section 28 of the Act provides only that state laws which do not conflict with the Act are permitted. To posit a substantive "violation" of the Act upon the mere existence of a state statute which may or may not conflict with the Act, rather than upon a failure to disclose, a material misstatement, or a fraudulent act, totally misconstrues the relationship between and the purposes of Sections 27 and 28. There is absolutely no authority for the Circuit Court's interpretation and assertion of jurisdiction under the Act. If jurisdiction exists, it is under the Supremacy Clause of the Constitution, not under Sections 27 and 28 of the Securities Exchange Act.

B. JURISDICTION DOES NOT EXIST UNDER EX PARTE YOUNG

The Circuit Court, in interpreting *Ex parte Young*, 209 U.S. 123 (1908), held in effect that a state official who carries out his statutory duties acts as an individual, not as a state official. The state allegedly then has no interest in any resulting lawsuit. This is of course an extreme example of a legal fiction, as the Circuit Court admits. The Idaho Director of Finance was obviously acting solely in his official capacity vis-a-vis the Great Western tender offer. *Ex parte Young* held merely that a Minnesota state official was subject to suit in the Minnesota federal court. No question of personal jurisdiction was ever presented. *Ex parte Young* does *not* hold that a state official is subject to suit as an individual defendant in the federal court of a different state. The Circuit Court has, however, given the case that broad and unwarranted interpretation.

III. *THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER THE TEXAS LONG-ARM STATUTE.*

Even if the Idaho officials are treated as private defendants, they have not been accorded the due process protection, as non-residents, which the Constitution requires. The due process standards for the assertion of jurisdiction over non-residents are set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee v. International Insurance Co.*, 355 U.S. 220 (1957), and *Hanson v. Denckla*, 357 U.S. 235 (1958). Due process requires both (1) some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, and (2) the presence of sufficient minimum contacts that the maintenance of the suit does not offend traditional notions of fair play and justice.

The Circuit Court, while alleging that the first part of this test is really not very important, states that the test is met because the "activities" of the Idaho officials within Texas were "to regulate tender offers." In other words, since the *impact* of the regulation was felt in Texas, the Idaho *activity* (regulation of tender offers) occurred in Texas, not Idaho. As the Circuit Court stated it: "The *impact* of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct *activities* in Texas." If this is now the test for jurisdiction over non-resident state officials, there may as well be no test at all since almost every state regulation will have an impact in other states.

The Circuit Court uses similar reasoning to conclude that the Constitutionally required "minimum contacts" are present due to the fact that the Idaho statute "amounted to the regulation of Great-Western's Texas-based activities." No other contacts with Texas are enumerated, since there are none. The Circuit Court has in effect created a new basis for jurisdiction which goes far beyond current holdings.

The Circuit Court attempts to justify its jurisdictional holding by drawing a distinction between, and asserting the unique character of state take-over statutes vis-a-vis other portions of state Blue Sky statutes and other state statutes generally. The Court in effect says that the extra-territorial *impact* of the take-over statute is unique because the statute has no relation to the in-state *transaction* which it is meant to regulate. Since the Court was attempting to show that the impact of the statute was what makes it unique, the Court should have examined that impact. In fact, the extra-territorial impact of the take-over statute is no more nor less than the extra-territorial impact of many other state statutes. Affirmation of the Circuit Court's expanded "impact" or "effect" test of due process would greatly expand present due process standards and would subject countless other state statutes to attack in out-of-state federal courts.

IV. *VENUE IS NOT PROPER IN THE NORTHERN DISTRICT OF TEXAS.*

A. THE SECURITIES EXCHANGE ACT DOES NOT SUPPORT VENUE.

The discussion above regarding jurisdiction under the Securities Exchange Act applies equally to the issue of venue. There was no substantive violation of the Act under Section 27.

Venue as provided under Section 27 is as follows:

> Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business. . . .

Venue is not proper in the Northern District of Texas because none of the defendants is found in or is an inhabitant of that district, none of the defendants transact business in the District, nor did the alleged violation occur there.

A Defendant "transacts business" in a district within the meaning of Section 27 "only when, among other things, its activities within the district constitute a 'substantial part' of its 'ordinary business'." *Gilson v. Pittsburgh Forgings Co.*, 284 F. Supp. 569, 570 (S.D.N.Y. 1968).

In interpreting the venue provisions of the anti-trust laws, which are analogous to those of the securities laws, the Supreme Court has held that the words "transacts business" mean "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" *U.S. v. Scophony Corp.*, 333 U.S. 795, 807 (1943).

There is no basis for finding that defendants "transacted business" in the Northern District of Texas within the meaning of that term as employed in Section 27.

The alleged "violation" of Section 27 did not occur in the Northern District of Texas either. In order to qualify a district as a proper forum in an action premised on a violation of the 1934 Act, a plaintiff must show that there occurred in that district an act "which represents more than an immaterial part of the allegedly illegal events." *Dopp v. American Electronic Laboratories, Inc.*, 55 F.R.D. 151, 155 (S.D.N.Y. 1972).

Some affirmative act which occurred within the forum district and which constituted an integral part of the "violation", is necessary to support jurisdiction. The present defendants undertook no affirmative acts in the Northern District of Texas. The alleged "violations" of which the plaintiff complains are merely manifestations of acts by the defendants in other districts.

B. 28 U.S.C. § 1391(b) DOES NOT SUPPORT VENUE.

The Circuit Court notes that under the "expansive" interpretation of 28 U.S.C. § 1391(b), proper venue is equal to the availability of compulsory process. The problem with this is that only "minimum contacts" are necessary to satisfy the compulsory process requirements. An action can have "minimum contacts" with many states at the same time sufficient to support compulsory process, but that does not mean that venue is proper in each of those states. The better test for determining where venue lies involves the balancing and weighing of contacts.

Paramount in this weighing process is the fact that the statute being interpreted is an Idaho statute. Further, all the acts of the state officials which are being complained of took place in Idaho. Great Western made its initial voluntary tender-offer filing in Idaho in compliance with the Idaho statute. All the *acts* or *occurrences* giving rise to the cause of action occurred in Idaho. Only the *impacts* of those acts were felt in Texas, and Texas is only one of many jurisdictions in which those impacts were felt. A weighing of contacts analysis should be much more concerned with the nexus of the acts giving rise to the cause of action, and not the multiple nexi of all the varying impacts of those acts.

The interest of the forum is also relevant in weighing contacts. The Idaho courts have a more substantial relationship to the Idaho statute and to the officials who attempted to enforce it, i.e., to the *acts* and *occurrences* which gave rise to the cause of action.

Under the appropriate weighing of contacts analysis, proper venue lies only in Idaho, not in Texas.

V. *THE DOCTRINE OF ABSTENTION AND PRINCIPLES OF COMITY AND FEDERALISM REQUIRE THE FEDERAL COURTS TO DECLINE FROM DECIDING THE SUBSTANTIVE ISSUES OF THIS CASE.*

The Fifth Circuit has held that in order for a federal court to interfere in state judicial proceedings, irreparable harm must be threatened for which an adequate state remedy does not exist. *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973). Federal courts should abstain especially when state courts have not had the opportunity to address the constitutionality of their own statutes and when constitutional issues might be avoided by state interpretation of unsettled questions of state law. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

In *Bellotti v. Baird*, 428 U.S. 132 (1976), the Court said:

> As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." Harrison v. NAACP, 360 U.S. 167, 177, 3 L. Ed.2d 1152, 79 S. Ct. 1025 (1959). See also Colorado River Cons. Dist. v. United States, 424 U.S. 800, 813-814, 47 L. Ed.2d 483, 96 S. Ct. 1236 (1976); Carey v. Sugar, 425 U.S. 73, 78-79, 47 L. Ed.2d 587, 96 S. Ct. 1208 (1976); Kusper v. Pontikes, 414 U.S. 51, 54-55, 38 L. Ed.2d 260, 94 S. Ct. 303 (1973); Lake Carriers' Assn. v. MacMullen, 406 U.S. at 510-511, 32 L. Ed.2d 257, 92 S. Ct. 1749; Zwickler v. Koota, 389 U.S. 241, 249, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967); Railroad Comm'n v. Pullman Co. 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941).

Although abstention is in the discretion of the court, the Supreme Court has not applied an "abuse of discretion" standard on review, but has rigorously applied the elements of the *Pullman* abstention doctrine. See *e.g. Bellotti v. Baird, supra*, and *Askew v. Hargrave*, 401 U.S. 476, 478 (1971). Thus, in deciding whether it must stay its own proceeding, a federal court must determine (1) whether the state law at issue is uncertain or unclear, and if it is, whether a state court construction of the statute will obviate or modify the federal constitutional issues, and (2) the effect of the delay and expense on the individual plaintiffs attendant with the application of the abstention doctrine.

There exist valid state issues upon which this action might be resolved. The Idaho tender-offer statute is a new enactment which has not yet been interpreted or construed by the courts ofIdaho. A number of state law issues should properly be decided by the Idaho courts. For example, an issue exists as to the purpose of the statute. The District and Circuit courts inappropriately took upon themselves the burden of determining the purpose of Idaho's take-over statute when no legislative purpose was stated. Such a determination should be made by a state court. By allowing the Idaho state courts to hear the pending case this Court may avoid a decision on constitutional grounds and minimize the conflict between the federal and state judicial systems.

An adequate remedy may have existed under state law, but Great Western never even attempted to ex-

haust its state administrative or judicial remedies. Instead, it went to a distant lower federal court for a tentative interpretation which might be displaced at any time by a definitive state court decision.

Great Western will suffer no undue delay, inconvenience, or expense if this Court stays this proceeding pending adjudication in state court. Numerous tender-offer offerors have had to comply with similar statutes in other states, and to cope with the attendant delays, without being irreparably harmed. Furthermore, as noted by the Circuit Court, the tender-offer has in fact already been consummated by negotiations between Great Western and Sunshine Mining and Metal Company.

This Court should stay the federal proceedings until Idaho's courts have had the opportunity to consider the many important issues presented.

VI. *THE IDAHO STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT*

Section 28 of the Securities Exchange Act of 1934 explicity recognizes the validity of state take-over statutes. At the time of the enactment of the Williams Act in 1968 there was in effect in Virginia a state Blue Sky statute regulating take-over offers and requiring registration of any take-over offer with state regulatory authorities. *See Code of Virginia*, § 13.1-528 *et seq.* Additionally, when Congress again amended the 1934 Act in 1970 and 1975, there were additional take-over

statutes in effect in various states. These various state statutes, like Idaho's, require registration of take-over offers with state securities authorities. Congress did not see fit in either 1970 or 1975 to include within the amendments to the 1934 Act any provision pre-empting state regulatory activity. Thus, Congress has evidenced a positive intent that there should be dual regulation of take-over offers by both state and federal regulatory authorities. Furthermore, there are now 32 states with take-over statutes, and Congress has still not seen fit to amend the Securities Exchange Act to pre-empt the regulation of take-overs by the states.

As the Supreme Court said in *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973):

> Where the Government has provided for collaboration the courts should not find conflict.

Since the federal securities laws and Idaho's Blue Sky laws, including its take-over statute, are not clearly in conflict, examination must center upon whether the Idaho law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52 (1940).

The purposes and objectives of Congress in enacting the Williams Act were to protect investors by requiring full disclosure and by prohibiting deceptive practices. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1970). As the Circuit Court notes, Congress took a "market approach" to accomplish its purposes.

The Idaho statutory scheme also protects investors. Its requirements and delays are arguably more burdensome upon offerors, but investors ultimately benefit therefrom.

Ohio's experience with its take-over statute is especially instructive. Ohio's *Amicus* brief before the Circuit Court is replete with examples of how that state's take-over statute has benefitted investors by insuring that they have sufficient time and information to intelligently decide whether to accept an offer, and by allowing sufficient time for the making of competing offers at higher prices. Experience under the Ohio statute clearly shows that the statute does not prevent tender offers or make local corporations tender-offer proof. The statute, in fact, merely supplements, and does not conflict with the market approach of the Williams Act.

Although, as noted by the Circuit Court, Congress may have chosen to reject certain statutory requirements which might delay the consummation of tender offers, this should not preempt state legislatures from enacting provisions which are absent from the federal legislation and which might cause certain delays, as long as the state statutes do not obstruct the overall purposes of the federal legislation.

The Circuit Court expressed special objections to specific sections of Idaho's take-over statute, such as the provision by which a target company's board of directors has the power to exclude an offer from certain state

regulations. If specific sections of the statute are in fact in conflict with the purposes of the Williams Act, that does not mean that the entire statute should be invalidated. States admittedly have a legitimate interest in insuring that tender offers provide sufficient disclosure and are otherwise fair, and those portions of the state law which properly address these interests and which are not in conflict with the purposes of the Williams Act should be allowed to stand.

State take-over statutes and the Williams Act both take the "market approach" to investor protection, although utilizing slightly different requirements. These differences in approach should not be determinative of the pre-emption issue. The test is whether the state statutes create an obstacle to the accomplishment of the federal purpose. State take-over statutes do not create such an obstacle to, but are merely another means of accomplishing, the purposes of the Williams Act.

CONCLUSION

The assertion of jurisdiction and venue by the District Court for the Northern District of Texas over the defendant Idaho state officials was improper, and should be reversed. The District Court should be ordered to vacate its opinion and dismiss the case. In the alternative, this Court should hold that the Idaho corporation take-over statute is not preempted by the federal Williams Act.

Respectfully submitted,

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